MALAYAN UNITED BANK BHD.

v.

MOHAMMED SALLEH MOHAMMED YUSOFF & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C6307 OF 1985]
18 DECEMBER 1987

CIVIL PROCEDURE: *Judgment in default irregular - Interest of 17.75% from date of judgment to date of realisation not allowed - Unamended O. 42 r. 12 RHC - Contract of guarantee - Interest agreed - Whether can vary rate of interest - Inordinate delay - Reasons as to why no action was taken.*

This was an application by the fourth defendant seeking an order of the Court that the judgment entered in default of appearance against him on 29 November 1985 and in execution of the said judgment issued be set aside. Applicant also asked that he be at liberty to defend in the action by entering an appearance within 3 days and filing his statement of defence within 14 days of entering the said appearance. Application was initially heard in chambers, order was given but upon application by plaintiff, it was adjourned to open Court for further arguments.

The fourth defendant was one of the guarantors for the first defendant in securing a credit facility of RM3 million. The first defendant failed to repay the loan and demands were made against all defendants. No payments were made. Plaintiff instituted action. Judgment in default was obtained against fourth defendant.

Held:

[1] Under the unamended O. 42 r. 12 RHC 1980 the maximum rate of interest permitted is 5%. The amended rule came into force on 12 December 1986 but inapplicable here as judgment in default was entered on 29 November 1985.

[2] Judgment in default irregular as the interest far exceeds the statutory rate of 8% per annum. The applicant was entitled *ex debito justitiae* to have the judgment set aside.

[3] The Court is unable to vary the interest as the principle in *Armitage v. Parsons* only applies where accidental slip or mistake exists and where the amount involved was insignificantly small. There was no such mistake in the present case.

[4] Delay in taking application to set aside should not be a ground for dismissing the application to set aside judgment in default where there is defence on the merits.

[5] Failure to give explanation as to delay in entering appearance should not be a ground to dismiss the application. The applicant's conduct was *bona fide* and no unreasonable delay exists.

[Application allowed. Costs awarded against plaintiffs.]

Cases referred to:

Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] CLJ (Rep) 349
Sim Lim Finance Ltd. v. Pelandok Enterprise Pte. Ltd. & Anor. [1981] 1 MLJ 280
Lim Eng Kay v. Jaafar bin Mohamed Said [1982] CLJ (Rep) 190
American International Assurance Co. Ltd. v. Union Builders (M'sia) Sdn. Bhd. [1973] 1 MLJ 95
Armitage v. Parsons [1908] 2 KB 410
Hughes v. Justin [1894] 1 QB 667

Hong Leong Equipment Sdn. Bhd. v. Manfo Development Sdn. Bhd. & Anor. [1986] CLJ (Rep) 371
Atwood v. Chichester [1878] 3 QBD 722
Evans v. Bartlam [1937] AC 473
Ladup Ltd. v. Siu [1984] 87 Law Society's Gazette 283
Vann v. Awford & Ors. [1986] The Times LR 23 April 1986 (194)

Legislation referred to:
Civil Law Act 1956, s. 11
Courts of Judicature Act 1964, ss. 16(i), 17, 25(2)
National Land Code 1965, s. 294
Rules of the High Court 1980, O. 42 r. 12
Rules of the Supreme Court 1957, O. 42 r. 16

For the plaintiff - Chandran; M/s. Adnan Sundra & Low
For the defendants - Narayanan; M/s. Ng Ek Teong & Partners

JUDGMENT

Zakaria Yatim J:

This was an application by the fourth defendant seeking the order of the Court that the judgment entered in default of appearance against him on 29 November 1985 and in execution of the said judgment issued thereon be set aside. The applicant also asked that he be at liberty to defend in the action by entering an appearance within three days and filing his statement of defence within fourteen days of entering the said appearance.

The application was heard in chambers. After hearing the submissions of both Counsel for the plaintiff and for the fourth defendant, and after considering the affidavits and the documentary evidence, I made the following order on 12 December 1986:

(1) Judgment in default of appearance entered against the fouth defendant be set aside.

(2) The fourth defendant was allowed to file his defence within fourteen days of the date of the order.

(3) The plaintiff paid the costs of the application to the fourth defendant in any event.

On the application of the plaintiff, I adjourned the matter to open Court for further argument.

The plaintiff's claim against the defendants, including the fourth defendant, was (a) for a sum of RM3,000,000; (b) interest at the rate of 2% above the prescribed rate of 15.75%, that is, 17.75% on yearly rests from 1 February 1985 to date of final settlement; (c) interest on the judgment sum at 8% per annum until final payment; (d) costs; and (e) plaintiff's solicitors legal charges in the sum to be agreed by all the defendants or to be taxed by the appropriate officer of the Court.

In the statement of claim, the plaintiff averred that by a loan agreement made on 3 November 1983, between the first defendant and the plaintiff, the first defendant had covenanted to repay the sum of RM3,000,000 loaned by the plaintiff to the first defendant on terms and conditions set out in the loan agreement. The plaintiff also averred that by a letter of guarantee dated 27 October 1983 the second, third and fourth defendants had, in consideration of the plaintiff giving credit facilities to the first defendant under the loan agreement, jointly and severally guaranteed payment on demand all monies due and owing by the first defendant to the plaintiff as at the date of the said guarantee and all monies that became due and payable on credit facilities afforded pursuant to the said guarantee, up to the extent of RM3,000,000. The plaintiff further averred that the second, third and fourth defendants had,

under the said guarantee, covenanted to pay interest at such rate as the plaintiff may, by notification, impose from time to time, and costs incurred by the plaintiff in the proceedings for the recovery under the said guarantee. The plaintiff had, pursuant to the loan agreement and the said guarantee granted credit facility to the first defendant by way of a term loan in the sum of RM3,000,000 on the terms and conditions of the loan agreement. The first defendant failed to make repayments as per the loan agreement and, was on 31 January 1985, owing the plaintiff a sum of RM3,523,383.98 representing the principal sum and interest accrued thereon up to that date. The plaintiff caused a demand to be made on the first defendant pursuant to the loan agreement and on the second, third, and fourth defendants pursuant to the said guarantee, by letters dated 8 April 1985 demanding payment of the sum loaned and guaranteed respectively together with all interests and costs. According to the plaintiff the defendants failed to pay the plaintiff the said sum or any part thereof.

On 29 November 1985, the plaintiff entered judgment in default of appearance against the fourth defendant. According to this judgment, the fourth defendant was required to pay to the plaintiff:

(a) the sum of RM3,000,000.

(b) interest at the rate of 2% above the prescribed rate of 15.75% i.e., 17.75% on yearly rests from 1 February 1985 to date of final settlement.

(c) costs of RM225.

(d) plaintiffs' solicitors legal charges in the sum to be agreed by the defendant or to be taxed by the appropriate officer of the Court.

Mr. Narayanan, Counsel for the applicant submitted that the judgment entered against his client was an irregular judgment because the amount in the judgment was more than that allowed by law as far as interest was concerned. He was referring to the 17.75% interest on the principal sum up to the date of final settlement. According to Mr. Narayanan, under O. 42 r. 12 of the Rules of the High Court 1980, the plaintiff was allowed only 8% interest from the date of judgment to the date of realisation. The applicant, in para. 4(b) of his affidavit in support of the application referred to the judgment which gave interest at 17.75% on yearly rests from 1 February 1985 to the date of final settlement. In the same paragraph, the applicant stated that the interest to be calculated from the date of judgment until judgment was satisfied should not exceed 8% per annum. The applicant averred that the judgment was an irregular judgment and ought to be set aside as the judgment had been given for a sum in excess of what the Rules of the High Court allowed.

Mr. Chandran, Counsel for the plaintiff/respondent submitted that the judgment was a regular judgment. According to him O. 42 r. 12 gave the Court the discretion whether to allow interest from the date of judgment until the judgment was satisfied at the rate of less than 8% or more than 8%.

It was not in dispute that up the date of judgment, the respondent was entitled to claim interest at the rate agreed upon between the parties. In the absence of agreement, the Court has the discretion to determine the rate of interest. The position regarding prejudgment period is clearly stated in s. 11 of the Civil Law Act 1956 (Revised 1972). The Section states:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section:

(a) shall authorise the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

The issue before the Court was whether the respondent was entitled to enter judgment and ask the applicant to pay interest at the rate of 17.75% from the date of judgment to the date of realisation.

Mr. Chandran argued that under para. 2.04 of the loan agreement, interest was agreed upon between the respondent and the first defendant. He also referred to the letter of guarantee in which interest was also stated. According to him, his client was entitled to claim the interest at the rate of 17.75% from the date of judgment to the date of realisation. In support of his argument, he relied on s. 16(i) and the proviso to s. 25(2) of the Courts of Judicature Act 1964 (Revised 1972). Section 16(i) states:

Rules of Court may be made for the following purposes ...

(i) for regulating the rate of interest payable on all debts, including judgment debts, or on the sums found due on taking accounts between parties or on sums found due and unpaid by receivers or other persons liable to account to the Court;

Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties ...

Section 16(i) is an enabling provision. It does not confer any power on the High Court regarding interest. It only confers power on the Rules Committee to make rules to regulate the rate of interest payable on all debts. Before the rules can come into force, it must be published in the *gazette* and it must also be laid before the Dewan Rakyat. (See s. 17). The Rules Committee had already made the rule pursuant to s. 16(i) and the rule is contained in O. 42 r. 12 of the Rules of the High Court 1980 in the following words:

Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

It is clear from the rule quoted above, that a plaintiff cannot claim, from the date of judgment, interest rate as agreed upon between the parties if such interest rate is more than 8% per annum. Lee Hun Hoe CJ (Borneo) in his judgment in *Supreme Finance (M) Berhad v. Koo Sin Ken* [1987] CLJ (Rep) 349, said, "O. 42 r. 12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement. ... We are also of the view that the appellants are entitled to retain their security until they were paid the principal sum and specified rates of interest up to the date of judgment but they were not entitled to interest on the judgment debt exceeding the statutory rate of 8% per annum under O. 42 r. 12." The above rule (the old rule) was amended last year and came into force on 12 December 1986, (the new rule). With effect from 12 December last year, a plaintiff may claim interest from the date of judgment until the judgment is satisfied at a rate agreed upon between the parties even though such interest rate is more than 8% per annum.

I shall next turn to s. 25(2) which states:

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

> Provided that **all such powers shall be exercised in accordance with any written law or rules of Court** relating to same.
> (Emphasis added).

The additional powers referred to in s. 25(2) are contained in item 7 of the Schedule and it states:

> Power to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court.

Unlike s. 16(i), s. 25(2) read with item 7 of the Schedule, confers the Court with the power "to direct interest to be paid on debts including judgment debts." But the power can only be exercised in accordance with any written law or rules of Court. There is no written law in this respect but the relevant rule of the Court is O. 42 r. 12. For the purpose of the present case the amended r. 12 of O. 42 does not apply as judgment in default of appearance was entered against the applicant on 29 November 1985 when the old r. 12 was still in force.

It is clear from the old r. 12 of O. 42, one is not entitled to interest at a rate of more than 8% per annum from the date of judgment up to the date of realisation. See the *Supreme Finance* Case, *supra*. In Singapore, O. 42 r. 12 is identical with our old r. 12 of O. 42. In construing this rule, Wee Chong Jin CJ, in *Sim Lim Finance Ltd. v. Pelandok Enterprise Pte. Ltd. & Anor.* [1981] 1 MLJ 280 said:

> ... in my judgment, they were not entitled under the present application for leave to enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8 per cent prescribed under O. 42 r. 12 ...

In *Sim Lim Finance* case, it was also argued that s. 18(2) (similar to our s. 25(2) of the Courts of Judicature Act) read with para. 7 of the First Schedule (Similar to para. 7 of the Schedule to our Act) gave the Court discretionary power to direct interest to be paid on a judgment debt and that in cases where there was agreement or covenant between the parties to pay interest at an agreed rate as well after or before any judgment, the Court had a discretionary power to order payment of interest at a rate exceeding the statutory rate of 8% per annum prescribed under O. 42 r. 12. Wee Chong Jin CJ, rejected this argument. In his judgment, the learned Chief Justice said,

> Section 18(2) of the Supreme Court of Judicature Act read with para. 7 of the First Schedule thereto enables the Court to direct interest to be paid and s. 80(2)(j) [identical to s. 16(i) of our Court of Judicature Act] gives power to the Rules Committee to make Rules of Court regulating the rate of interest payable on, *inter alia*, judgment debts. Order 42 r. 12 prescribed the maximum rate of 8 per cent per annum payable on every judgment debt and it has the force of laws. (Words in square brackets added).

The 8% interest is the maximum rate of interest permitted under the rule. The Court, however, has the discretion to award interest at a lesser rate. In *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] CLJ (Rep) 190, the Federal Court confirmed the decision of the High Court awarding 6% interest after the date of judgment in an accident case.

The cases referred to so far are consistent with one another in that under the old r. 42 O. 12, the Court can only award interest from the date of judgment until realisation at the rate not exceeding 8%. My attention was drawn to a case where the Court allowed interest at the rate of 11% until realisation. The case, *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 MLJ 95 was decided by the Federal Court in 1971. The appellants were chargees of certain lands on the security of which the respondent was given a loan of 1,250,000 bearing interest at 11% per annum. The respondent defaulted in

payment of a number of instalments and interest and notice default was given under s. 294 of the National Land Code. Subsequently an order for the sale of the lands was made by the High Court to recover the sum due to the appellants together with interest at the rate of 11% per annum up to the date of the order and further interest at the rate of 6% per annum to the date of realisation. The Federal Court held that as the appellants' claim as chargees was not on the covenant but in exercise of their remedy against a chargor in default there could not be any merger in the judgment and the appellants were therefore entitled to interest at the agreed rate of 11% until realisation of the security.

It will be noted that in the *American International Assurance* case, the Federal Court applied the merger principle. The Court however made no reference to the Supreme Court Rules 1957. In my opinion, under O. 42 r. 16 of the Supreme Court Rules, the Court had the power to award an agreed rate of interest higher than the statutory rate of interest as provided in the Supreme Court Rules. Order 42 r. 16 of the Supreme Court Rules states:

> Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of six per cent per annum, from the time when the judgment or order was entered or made, provided that in cases where there is an agreement between the parties that more than six percent interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interests so agreed.

The *American International Assurance* case was decided in the light of the provisions of the Rules of the Supreme Court 1957 in particular O. 42 r. 16 and, therefore, cannot be used as an authority in the present case.

Having considered the sections relied upon by Mr. Chandran, and having considered the authorities above, I am satisfied that Mr. Chandran's arguments had no merit whatsoever.

In the circumstances, the respondent had entered judgment in default of appearance against the applicant with interest rate from the date of judgment to the date of realisation far in excess of the statutory rate of 8% per annum.

Mr. Chandran asked the Court to vary the rate of interest, presumably to bring it down to the statutory rate of 8% per annum. In my opinion if the figure had been entered by mistake or if the solicitor's clerk had inadvertently filed the wrong figure and the error had not been discovered, then there was clearly an accidental slip which should be corrected. Where there was such a mistake and the amount involved was insignificantly small, the mistake could be corrected and the judgment in default should not be set aside. *Armitage v. Parsons* [1908] 2 KB 410 @ 417. In the instant case I do not think there was a mistake or accidental slip in putting the rate of interest at the rate of 17.75% per annum. It was stated in the statement of claim; it was stated in the judgment in default and indeed Mr. Chandran strenuously argued before me to justify that the respondent was entitled to that rate of interest. The respondent in fact deliberately included interest at the rate of 17.75% from the date of judgment to date of realisation. If this rate of interest is calculated on the basis of the principal sum of RM3,000,000 the amount would be significantly large. The principle in *Armitage v. Parsons supra*. does not apply in the present case and there is no question for the Court varying the rate of interest at this state.

Since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% per annum, the applicant has a right *ex debito justitiae* to have the judgment set aside. *Hughes v. Justin* [1894] 1 QB. 667 @ 669.

At the hearing of the application in chambers, Mr. Chandran referred to para. 2 of the applicant's affidavit in support of the application and said, "I am not taking point on delay. I think he has given reasons ..." When the matter was adjourned to open Court for further argument, Mr. Chandran, however, submitted, "It took applicant 10 months to set aside. This is inordinate delay." Mr. Narayanan interrupted him and said, "I am taken by surprise on question of inordinate delay."

The question for the Court to consider was whether there was inordinate delay and if there was inordinate delay in filing the application, whether such delay was fatal to the application. Mr. Chandran relied heavily on the decision in *Hong Leong Equipment Sdn. Bhd. v. Manfo Development Sdn. Bhd. & Anor.* [1986] CLJ (Rep) 371. In that case it was stated that "the Court will expect the application to set aside to be filed promptly and if not the explanation if any for the delay would be relevant." In my opinion it is not a rule on a principle of law that an application to set aside judgment in default must be filed promptly. Where no irreparable wrong would be done to the plaintiff who had obtained judgment in default, lapse of time was not a bar to an application to set aside. See *Atwood v. Chichester* [1878] 3 QBD. 722. In *Evans v. Bartlam* [1937] AC. 473, Lord Atkin said. "The principle obviously is that unless and until the Court has pronounced a judgment upon the merit or by consent, it is to have the power to revoke the expression of its coersive power where that has only been obtained by a failure to follow any of the rules of procedure." Delay therefore, should not be a ground for dismissing an application to set aside judgment in default unless there is no defence on the merits. The important consideration in an application to set aside judgment in default is whether there is defence on the merits. The question of delay is a secondary matter. *Ladup Ltd. v. Siu* [1984] 87 Law Society's Gazette 283.

In the present case, judgment in default of appearance was entered against the applicant on 29 November 1985. The application to set aside the judgment was filed on 3 September 1986. There was a delay of slightly over nine months. In his affidavit in support of his application, the applicant averred that when the writ of summons was served on him he forwarded it to his then solicitors in Penang for their action but due to errors and difficulty in communication his appearance to the said writ was not filed in time and the plaintiff consequently obtained judgment in default against him. The applicant further averred that by letter dated 7 April 1986, the solicitors for the plaintiff informed the applicant about the said judgment and if payment was not received by the plaintiff, a bankruptcy notice would be issued against the applicant. At the time the said letter was sent to the applicant's office, the applicant was not in the country, as he was undergoing medical treatment abroad. According to the applicant, his office informed the plaintiff's solicitors to hold matters in abeyance till the applicant returned which was about three months thereafter. The applicant also averred that when he returned from abroad, he came to know that the first defendant as borrower and the second defendant as guarantor had been served with the same writ and that the plaintiff had taken out an O. 14 application against the first and second defendants which had been set down for hearing on 23 October 1986. The applicant said that he then engaged Messrs. Ng Ek Teong and Partners, who were acting as solicitors for the second defendant to also act for the applicant in this matter and to take steps to set aside judgment in default obtained against him in view of the fact that the said solicitors were also defending the second defendant as guarantor and had been appraised of the full and complete facts and background of the loan agreement. Finally, the applicant averred that he had at all times intended to appear and defend the said action, but due to unforeseen circumstances the judgment in default was obtained against him.

From what was stated in his affidavit, I found that it was not through his negligence that the judgment was obtained against him. I also find that the conduct of the applicant was all the time *bona fide*. Finally I find no unreasonable delay in the filing of the application to set aside the judgment in default in view of the circumstances in this case.

Apart from the question of delay, Mr. Chandran also submitted that there was nothing in the applicant's affidavit in support of the application that contained an explanation as to why no action was taken from the date of service to the date of judgment. He added that no good reasons were given as to why appearance was not entered. He further submitted that the fourth defendant had not come before this Court with clean hands. In support of his submission he again cited *Hong Leong* case *supra*. In *Evans v. Bartlam, supra*. Lord Atkin, emphasised at p. 480 of his judgment, that there was no rule that the applicant must satisfy the Court that there was a reasonable explanation why judgment was allowed to go by default. But whatever reason, if any, for allowing judgment and thereafter applying to set it aside was one of the matters to which the Court would have regard in exercising its discretion to set aside judgment in default. In my opinion, if the applicant failed to give an explanation as to why he neglected to enter appearance, such failure should not be a ground to dismiss his application. The Court may, however, order him to pay costs. In *Evans v. Bartlam, supra.*, Lord Wright, in his judgment at p. 489 said, "The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule **his fault (if any) in that respect can be sufficiently punished by the terms as to costs** or otherwise which the Court in its discretion is empowered by the rule to impose." (Emphasis added). Recently, the English Court of Appeal decided that where a defendant who deliberately misled the Court by lying about the reason for not defending an action, he was nevertheless entitled to have the judgment in default of appearance set aside because he was able to show that there were triable issues arising out of the plaintiff's claim. The Court, however, allowed him to defend the action on stringent conditions as to his paying security and paying costs. *Vann v. Awford & Others* [1986] The Times LR. 23 April 1986 (194).

From the applicant's affidavit in support of the application, I was satisfied that he had a valid explanation as to why appearance was not entered after the writ was served on him. His conduct was very prompt and it was not his fault that appearance was not entered. He should not, therefore, be asked to pay costs. On the other hand, since the judgment was an irregular judgment, it was the plaintiff who should pay the costs.

For the reasons stated above I confirmed the order I made in chambers on 12 December 1986 and ordered that the plaintiff pay the applicant the costs of further argument.

Also found at [1988] 2 CLJ 460